

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

APR 11 1996

In the Matter of)
)
Implementation of Section 302 of) CS Docket No. 96-46
the Telecommunications Act of 1996)
)
Open Video Systems)

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REPLY COMMENTS OF BARTHOLDI CABLE COMPANY, INC.

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April 11, 1996

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SUMMARY

One of the principal goals of the Telecommunications Act of 1996 (the "1996 Act") is to ensure that consumers have easy access to varied video programming options at competitive prices. To achieve this goal, the 1996 Act allows LECs to deploy open video systems ("OVS") which will permit a multitude of multi-channel video programming distributors to offer programming directly to subscribers. However, if OVS is to emerge in the marketplace, LECs must affirmatively choose to deploy OVS rather than traditional cable systems.

As a multi-channel video programming distributor ("MVPD"), Bartholdi is keenly interested in the success of OVS. With this interest in mind, Bartholdi offers the following suggestions:

1. The Commission should adopt regulations that afford LECs reasonable flexibility to construct and operate OVS Networks. Otherwise, LECs will likely choose to construct traditional cable systems, thereby offering consumers less programming options and leaving MVPDs like Bartholdi without a facilities-based option to deliver programming to subscribers.

2. The Commission should regulate OVS differently than it regulated video dialtone. Specifically, the Commission should (i) provide a streamlined process for OVS entry into the video marketplace; (ii) not allow competitors to game the OVS regulatory process; and (iii) allow OVS operators sufficient flexibility to design and implement their systems.

3. The Commission should afford MVPDs sufficient regulatory

flexibility to establish programming packages that can compete with the programming offered by franchised cable operators. In this regard, the Commission should (i) apply the cable PEG requirements only to OVS operators and not to MVPDs; and (ii) confirm that both affiliated and non-affiliated OVS MVPDs are not cable operators.

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Bartholdi Cable Company, Inc. ("Bartholdi") (formerly known as Liberty Cable Company, Inc.), pursuant to the provisions of Section 1.415 of the Commission's rules, by its attorneys, submits these Reply Comments in the above-referenced proceeding.

I. BACKGROUND.

Bartholdi is a multichannel video programming distributor ("MVPD") competing directly with Time Warner, the franchised cable operator, in the New York metropolitan area. Bartholdi presently provides video programming to dozens of multiple dwelling units ("MDUs") housing approximately 28,000 subscribers. Bartholdi is widely regarded as a leading innovator in the use of the 18 Ghz frequency band to provide video services and operates the largest 18 Ghz microwave network in the United States.^{1/} Bartholdi was also among the first MVPDs in the

^{1/} See In the Matter of Amendment of Part 94 of the Commission's Rules to Permit Private Video Distribution Systems of Video Entertainment Access to the 18 GHz Band, Report and Order, PR Dkt. No. 90-5, 68 RR 2d 1233 (1991).

U.S. to participate in a video dialtone ("VDT") trial.^{2/}

As a pioneer competitor in the video services marketplace, Bartholdi has a great interest in the future success of open video systems ("OVS"). MVPDs like Bartholdi face tremendous obstacles when they attempt to compete against franchised cable operators in the video marketplace. In most markets, the franchised cable operator maintains an absolute or virtual monopoly on the provision of video services.^{3/} In several markets, the cable monopolist has taken affirmative, anti-competitive action to retain its monopoly market share.^{4/} Despite devoting extraordinary time and resources to marketing a video product both superior to and less expensive than, its competitor's, Bartholdi's market share in the New York area remains negligible. Only through the construction and deployment of OVS will MVPDs like Bartholdi have a meaningful opportunity to compete with the established cable monopoly. Whether this opportunity is ever realized, however, depends on the Commission's approach to regulating OVS.

^{2/} See In the Matter of the Application of New York Telephone for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Construct, Operate, Own and Maintain Facilities and Equipment to Test Video Dialtone Service in Portions of New York City, 8 FCC Rcd. 4325 (1993).

^{3/} In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Dkt. No. 95-61. ¶ 194 (1995) ("1995 Competition Report").

^{4/} See, e.g., Comments of Liberty Cable Company, Inc., in CS Dkt. No. 95-61 at 6-14.

II. TO ENCOURAGE THE DEPLOYMENT OF OVS, OVS OPERATORS MUST BE AFFORDED REASONABLE FLEXIBILITY TO CONSTRUCT AND OPERATE OVS SYSTEMS.

Pursuant to the Telecommunications Act of 1996 (the "1996 Act"),^{5/} local exchange carriers ("LECs") can provide facilities-based video programming to subscribers through either a traditional cable system or through an OVS.^{6/} If LECs choose to operate traditional cable systems, consumers will have only one other source for video services, and independent MVPDs will remain at the fringes of the video marketplace. A duopoly market cannot be what Congress intended. In contrast, if LECs choose to construct and operate OVS, it is more likely that consumers will have access to a multitude of MVPDs offering a variety of programming options on the OVS platform. The ensuing competition will lead to lower prices for video services.

As the Commission embarks on this rulemaking proceeding, two points are clear:

1. It is in the public interest for LECs to operate OVS rather than traditional cable systems because OVS is more likely to create a multitude of video programming sources thereby fostering a more competitive video marketplace; and

2. The Commission, through the OVS rules it adopts, can either encourage or discourage the deployment of OVS. The

^{5/} Pub. L. No. 104-104, 110 Stat. 56 (approved February 8, 1996).

^{6/} 47 U.S.C. § 571(a).

Commission can encourage LECs to deploy OVS by promulgating flexible regulations that make OVS an attractive alternative to traditional cable. Conversely, the Commission will discourage OVS if the OVS regulations make the entry and operation of such systems overly burdensome.

Congress has made its intentions about how OVS should be regulated very clear; it mandated that the OVS regulatory framework promote flexible market entry, enhanced competition, streamlined regulation, a diversity of programming choices, investment in infrastructure and technology, and increased consumer choice.^{7/} It is as if Congress anticipated the self-interested chorus demanding strict regulation of OVS entry and operation.^{8/} To guide the Commission in the face of this predicted onslaught, the Congress explained:

There are several reasons for streamlining the regulatory obligations of such [OVS] systems. First, the conferees hope that this approach will encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets. Second, the conferees recognize that common carriers that deploy open video systems will be "new" entrants in established markets and deserve lighter regulatory burdens to level the playing field. Third, the development of competition and the operation of market

^{7/} See H.R. Conf. Rep. 458, 104th Cong., 2d Sess, 172, 177-78 (1996) (the "Conference Report").

^{8/} See, e.g., Comments of the National Cable Television Association, Comments of Time Warner, Comments of Continental Cablevision, Joint Comments of Cablevision Systems Corporation and the California Cable Television Association.

forces means that government oversight and regulation can and should be reduced.^{9/}

In mandating streamlined regulations for OVS, Congress recognized that LECs must be given flexibility in structuring OVS if the service is to become a viable alternative to traditional cable. Such "streamlined regulatory obligations" are not found in the rigid VDT-style regulatory framework suggested by the cable industry.^{10/} The Commission must take great care to assure OVS is not still born as was VDT.

This is not to say that Bartholdi is suggesting that LECs should enjoy unfettered discretion in determining, for example, which programmers may be carried on its OVS, the rates, terms and conditions of such carriage, and how information will be presented to OVS subscribers. As an MVPD, Bartholdi is concerned that all MVPDs have reasonable access to OVS and are treated in all respects in a non-discriminatory manner.

III. OVS MUST BE REGULATED DIFFERENTLY THAN VDT.

The 1996 Act recognizes that the regulatory structure governing VDT was a primary reason why VDT never emerged as a viable alternative to cable.^{11/} Bartholdi also recognizes this

^{9/} Conference Report at 178.

^{10/} See, e.g., Comments of Comments of the National Cable Television Association, Comments of Time Warner.

^{11/} See 47 U.S.C. § 573(c)(3), See, also, Conference Report at 72, 178-79.

fact and implores the Commission to take a different approach in its regulation of OVS. To this end, Bartholdi offers the following suggestions.

1. Provide a Streamlined Process for OVS Entry into the Video Marketplace.

Under the VDT regulatory framework, before a LEC could offer video dialtone service, it had to obtain Section 214 authority, petition for a waiver of the Commission's Part 69 rules, and file a tariff detailing the rates it would charge programmers for carriage on its VDT platform. The Section 214 process alone generally lasted several months and often over a year.^{12/} The delays in the VDT approval process made VDT an inherently unattractive option for LECs and programmers. For LECs, the 214 process made it difficult (and, sometimes, impossible) to enter the video services market. For programmers, the 214 process made it nearly impossible to formulate business plans involving VDT carriage.

The Commission can avoid this result with OVS by adhering to the OVS entry requirements set forth in the 1996 Act. Before an OVS operator may operate its system, the Act requires: (i) the OVS operator to certify to the Commission it is in compliance with the Commission's OVS regulations; and, (ii) the Commission to approve

^{12/} See "VDT Applications Pending," Telecommunications Reports, May 29, 1995, p. 30 (discussing applications of US West, Pacific Bell and Bell Atlantic, which all had been pending for over one year).

or disapprove of the certification within 10 days.^{13/} This Congressionally mandated 10-day approval period requires the Commission to establish a streamlined approval process. Burdensome requirements for pre-certification filings or compliance activity would violate congressional intent and invite the abuses and delays associated with the VDT authorization process. Therefore, the Commission should require only: (i) minimal factual information about the OVS system in question; and (ii) a statement that the operator intends to comply with the Commission's rules.

2. Do Not Allow Competitors to Manipulate the OVS Entry Process.

The VDT authorization process afforded parties (including cable operators whose primary interest was to prevent the introduction of competition into the marketplace) the opportunity to challenge VDT applicants at many stages in the process. Predictably, the cable industry opposed VDT applications at nearly every opportunity and repeatedly raised the same arguments. Unfortunately, the Commission chose to analyze and reanalyze the same cable industry arguments again and again.^{14/} By taking such

^{13/} 47 U.S.C. § 573(a)(1).

^{14/} For example, on May 23, 1994, GTE filed four 214 applications to provide commercial VDT service in Virginia, Florida, California and Hawaii. The Commission granted all four applications on May 5, 1995. Throughout the year-long approval process, and even after the applications were granted, the NCTA raised the same challenge in no fewer than five separate filings to GTE's economic justification for the proposed offerings. Application for Review at 12, June 5, 1995; Ex Parte Comments at (continued...)

action, the Commission allowed the cable industry to delay the introduction of competition in the video marketplace.

By adhering to the intent behind the 1996 Act, the Commission can avoid a repeat of the VDT debacle and can encourage the deployment of OVS. As noted above, the 1996 Act mandates a streamlined certification process and requires this process to last no more than 10 days. It difficult to imagine that Congress contemplated the certification process to include a notice and comment period followed by a period of FCC analysis of each set of comments. The Commission should not implement such a process where it was not intended.

3. **Do Not Impose Stringent Operating Regulations on OVS Operators.**

In drafting its VDT regulations, the Commission appeared to be singularly concerned with protecting MVPDs from discrimination. For example, the Commission placed limits on the amount of analog capacity that could be allocated to a single MVPD, and restricted an MVPD's ability to share channel capacity.^{15/} As a result, VDT operators would have been unable to offer subscribers the varied programming that subscribers presently receive from the franchised

^{14/} (...continued)
5-8, April 14, 1995; Reply Comments at 12-25, January 18, 1995; Motion to Dismiss at 3-10, November 21, 1994; Petition to Deny, at 2-6, July 5, 1994.

^{15/} See In re Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54 - 63.58, Memorandum Opinion and Order in CC Dkt. No 87-266, ¶ 35 (1994).

cable operator. These types of regulations will discourage LECs from deploying OVS.

The 1996 Act mandates that OVS operators treat all programmers, affiliated or non-affiliated, in a non-discriminatory manner, and sets forth guidelines for the Commission to enforce this mandate.^{16/} However, in implementing these guidelines, the Commission must afford OVS operators reasonable flexibility to operate their OVS in a manner that each operator believes will create competition in its particular market. Congress expressly recognized that OVS operators will need certain flexibility to develop systems in accordance with local needs and explicitly rejected regulations that mandate a "one-size-fits-all" OVS:

The conferees recognize that telephone companies need to be able to choose from among multiple video entry options to encourage entry, and so systems under this section [must be] allowed to tailor services to meet the unique competitive and consumer needs of individual markets.^{17/}

No provider, regulator or consumer can predict how OVS will develop or be marketed, either immediately or in the future. Regulations that dictate network configuration or predict market demand and only allow for systems in accord with such dictates and predictions, will eliminate any opportunity for OVS to develop as an alternative to cable.

^{16/} 47 U.S.C. § 573(b)(1).

^{17/} Conference Report at 177.

IV. MVPDs MUST HAVE SUFFICIENT FLEXIBILITY TO COMPETE WITH INCUMBENT CABLE OPERATORS.

In nearly every area where OVS will be marketed, the incumbent cable operator will have a monopoly or, at least, will be the dominant video provider.^{18/} Consumers are not likely to switch video service providers unless they have a compelling reason to do so. MVPDs offering video service over an OVS will have to offer a superior service at a lower cost to even have a chance of entering the video services marketplace. Therefore, the Commission must afford MVPDs using OVS platforms maximum regulatory flexibility to attract consumers, and the Commission must refrain from imposing regulations on MVPDs other than those specifically and expressly mandated by the 1996 Act.

1. The PEG Requirements Should be Applied Only to OVS Operators.

In the Notice of Proposed Rulemaking, the Commission seeks comment on whether and how the OVS operator should be required to provide the PEG channels to all subscribers including those who do not subscribe to the operator's programming service.^{19/} The 1996 Act sets the parameters for answering this question by authorizing the Commission to apply the cable PEG requirements only to OVS

^{18/} See Conference Report at ¶ 194.

^{19/} In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, Notice of Proposed Rulemaking, CS Docket No. 96-46, FCC 96-99, ¶ 57 (released March 11, 1996) (the "NPRM").

operators.^{20/} The 1996 Act does not authorize the Commission to apply the PEG requirements to MVPDs that are purchasing carriage from the OVS operator, nor can any such intent be found in the legislative history.

Bartholdi suggests that the Commission require OVS operators only to make the PEG channels available on its network. To satisfy this requirement, OVS operators should be permitted to interconnect to the local cable operator's PEG channel feeds.^{21/}

2. The Commission Should Confirm that MVPDs Offering Service Over an OVS are Not Cable Operators.

The Commission should confirm that an MVPD offering video services directly to subscribers over an OVS is not a cable operator, as defined in the Communications Act, regardless of whether the MVPD is affiliated with the OVS operator.

A determination that an OVS operator or its MVPD affiliate is not a cable operator is mandated by the clear language of the 1996 Act. Under the 1996 Act, a common carrier providing programming to subscribers over a certified OVS is expressly not subject to Title VI cable regulation (except as provided for in Section 653).^{22/} Indeed, the OVS regulatory framework in the 1996 Act is intended to govern OVS operations in lieu of traditional cable regulation.^{23/}

^{20/} 47 U.S.C. § 573(b)(1)(A).

^{21/} NPRM at ¶ 57.

^{22/} 47 U.S.C. § 573(c)(1).

^{23/} 47 U.S.C. 571(a)(4), (a)(4). Conference Report at 172.

Only this interpretation is consistent with the legislation's unambiguous intent to ease the regulatory burden on OVS operators so that they may effectively compete with cable operators.

A determination that non-affiliated MVPDs are not cable operators logically follows the Commission's earlier ruling that non-affiliated customer-programmers on video dialtone systems are not cable operators.^{24/} In its First Report and Order in the VDT docket, the Commission ruled that VDT customer-programmers are not cable operators because "they neither own a significant interest in the telephone company broadband facilities, or control, or are responsible for the management and operation of those facilities."^{25/} At the time, the cable industry was attempting to force VDT customer-programmers to obtain cable franchises and, thus, had argued that VDT customer-programmers were cable operators. To avoid a recurrence of this argument in the OVS context, the Commission should quickly and decisively clarify that non-affiliated OVS MVPDs are not cable operators, and the Commission should apply the same rationale that it used in the VDT context. Clearly, OVS MVPDs will neither own a significant interest in the OVS broadband facilities nor will they control or

^{24/} In the Matter of Telephone Company-Cable Television Cross-Ownership Rules, Further Notice of Proposed Rulemaking, First Report and Order and Second Further Notice of Inquiry, CC Dkt. No. 87-266, 7 FCC Rcd. 300, ¶ 52 (1991). petition for rev. denied, National Cable Television Association, Inc. v. FCC, 33 F 3d. 66 (D.C. Cir. 1994).

^{25/} Id.

be responsible for the management or operation of the facilities. Following the Commission's clear and unequivocal precedent on this matter, OVS MVPDs are not cable operators.

V. CONCLUSION.

The 1996 Act may be a watershed in the development of competition in the video services marketplace depending upon how the Commission regulates OVS. One of the principal goals of the Act is to dramatically alter today's market to ensure that consumers will have easy access to varied programming options at competitive prices. Congress has created the OVS to achieve this goal; the 1996 Act and Conference Report are replete with language directing the Commission to encourage LECs to deploy OVS rather than traditional cable systems. Bartholdi asks the Commission to heed Congress's clear intent as it adopts rules to govern the entry and operation of OVS networks.

Respectfully submitted,

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Dated: April 11, 1996